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2 HONORABLE ROBERT S. LASNIK  
3 TRIAL DATE: June 1, 2009  
4  
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7

8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON AT SEATTLE  
10

11 GEORGE PRUE,  
12 Plaintiff,  
13 v.  
14

15 UNIVERSITY OF WASHINGTON,  
16 Defendant.  
17

18 No. C07-1859 RSL  
19  
20 DEFENDANT'S TRIAL BRIEF  
21

## **I. INTRODUCTION**

13 This case involves Plaintiff George Prue's claims of race and age discrimination and  
14 retaliation against Defendant University of Washington. Trial is scheduled to start June 1,  
15 2009.

## **II. FACTUAL BACKGROUND**

17 In 2005, Plaintiff George Prue moved to Seattle, Washington and applied on-line for  
18 various jobs at the University of Washington. In August, he signed up to be in a pool of  
19 temporary employee's available for temporary assignments throughout the University; the  
20 pool was managed by an internal placement department known as U-Temps.

21 In September, Mr. Prue was referred to the Department of Medical Education for a  
22 screening interview for a temporary assignment in the MEBI division. He was interviewed  
23 by Rachael Hogan, an employee in the Department. He was not selected among several  
24 candidates for the assignment. The interview was brief, and Ms. Hogan thought Mr. Prue

DEFENDANT'S TRIAL BRIEF-1  
Cause No. C07-1859 RSL

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1 did not seem interested in the MEBI position. she thought it sounded to her like he may  
2 interested in positions with one of the University's medical centers; Mr. Prue claims Ms.  
3 Hogan cut the interview short and rejected him because of his race and age. Kevin Kovach  
4 was selected for the temporary assignment which lasted three months.

5 Mr. Prue remained in the U-Temps pool throughout September. He was notified of  
6 available temporary assignments when he called in to report his availability, and was out on  
7 an assignment for part of the month. He claims he was only referred out to "manual labor"  
8 jobs instead of administrative positions he was more interested in. He stopped calling in to  
9 report he was available and interested in temporary work after just 4-5 weeks in the U-  
10 Temps pool.

11 After his interview with Ms. Hogan, Mr. Prue sent an email to the Vice President of  
12 Human Resources expressing dissatisfaction with the interview and suggesting he thought it  
13 was cut short because of his race. He claims he was retaliated against for sending this  
14 email. The evidence at trial will show that no one working with him to place him on an  
15 assignment was aware of his communication to the Vice President, who does not work in  
16 the U-Temps Department.

17 Mr. Prue continued working for the Seattle School District for the next few years.  
18 He is seeking back pay and general compensatory damages for age and race discrimination  
19 and for retaliation under state and federal law.

20 **III. LEGAL ISSUES**

21 **A. Plaintiff's Title VII Disparate Treatment Race Discrimination Claims Against**  
**the University of Washington .**

22 **1. Disparate Treatment.**

23 Plaintiff claims he was treated differently by University employee Rachael Hogan

1 because of his race (African-American) by failing to select him for the temporary  
 2 assignment to the Administrative Coordinator position in September of 2005. He also  
 3 claims he was treated less favorably in the assignments he received from U-Temps.

4 The evidence at trial will show that the only potential materially adverse  
 5 employment action<sup>1</sup> by the University may be the failure to select him for the temporary  
 6 Administrative Coordinator assignment, which lasted three months. Plaintiff now claims he  
 7 was also treated differently in the manner in which he was referred to other temporary  
 8 assignments; however, it is questionable whether this would constitute an actionable  
 9 “adverse employment action” to warrant inclusion in disparate treatment instructions to the  
 10 jury. If the disparate treatment instructions are given to include this claim, the court should  
 11 give an additional instruction allowing the jury to determine whether the Plaintiff has  
 12 established an actionable adverse employment action sufficient to support a disparate  
 13 treatment claim.

14 Ninth Circuit Model Jury Instruction 10.4A.2 provides:

15 **TITLE VII—“ADVERSE EMPLOYMENT ACTION” IN DISPARATE  
 16 TREATMENT CASES**

17 An action is an adverse employment action if it materially  
 18 affects the terms, conditions, or privileges of employment.

19  
 20 *9<sup>th</sup> Circuit Model Instr. No. 10.4A.2*

21  
 22  
 23  
 24 <sup>1</sup> The definition of “adverse employment action” for purposes of a disparate treatment claim comes from *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1126 (9th Cir.2000) (finding that “[t]he removal of or substantial interference with work facilities important to the performance of the job constitutes a material change in the terms and conditions of a person’s employment” and therefore qualifies as an adverse employment action, but that the employer’s failure to respond to grievances did not amount to an adverse employment action because “it did not materially affect the compensation, terms, conditions, or privileges of the [plaintiffs’] employment”). *See also Kang v. U. Lim America, Inc.*, 296 F.3d 810, 818–19 (9th Cir.2002) (plaintiff established a *prima facie* case of disparate treatment where the defendant subjected the plaintiff “to a number of adverse employment conditions, including severe verbal and physical abuse, discriminatory overtime, and termination, that constituted ‘a material change in the terms and conditions’ of [the plaintiff’s] employment”).

1           **2. The Court Should Not Give the Plaintiff's Proposed "Pretext" Jury  
2           Instruction.**

3           The court should deny Plaintiff's request that the jury be instructed that it can infer  
4           the defendant University acted on the basis of unlawful discrimination if it's "asserted  
5           reasons" for its actions are unworthy of belief. In *Browning v. United States of America*,  
6           No. 07-35557 (9<sup>th</sup> Cir. May 22, 2009) and *Cassino v. Reichold Chemicals, Inc.* 817 F.2d  
7           1338 (9<sup>th</sup> Cir. 1987), the Ninth Circuit affirmed District Court decisions rejecting similar  
8           proposed instructions in discrimination cases.

9           Properly recognizing that the jury will receive instructions on evaluating witness  
10          credibility and the elements the Plaintiff needs to prove to prevail on his disparate treatment  
11          claim, which include proving that race was a "motivating factor" in allegedly  
12          discriminatory conduct toward him, the court ruled the Plaintiff could argue the defendant's  
13          "true" motive to the jury based on the instructions as given. *Id.* The jurors will also be  
14          instructed on evaluating "circumstantial" evidence, which allows Plaintiff to argue his  
15          theory of the case.

16          The instruction proposed by Plaintiff constitutes an unnecessary comment on the  
17          evidence. It is also contrary to the standards set forth in *Reeves v. Sanderson Plumbing*  
18          *Prods., Inc.*, 530 U.S. 133, 147 (2000)(Title VII) and *Hill v. BCTI-Income Fund*, 144  
19          Wn.2d 172 (2001)(RCW 49.60). Both cases addressed the *McDonnell-Douglas* burden-  
20          shifting mechanism for summary judgment/directed verdict proceedings, explaining  
21          standards under which the ultimate question of fact (*i.e.*, whether the employer's real  
22          motivation is unlawful discrimination) is one for the jury. In *Reeves*, the Supreme Court  
23          reiterated that "trial courts should not 'treat discrimination differently than other ultimate  
24          questions of fact.'" *Reeves*, 120 S.Ct. at 2109.

1       In *Hill*, despite evidence at trial that the employer's explanation for terminating the  
 2 plaintiff's employment was not truthful and applying the standards from *Reeves*, the  
 3 Washington Supreme Court held the evidence was still insufficient to establish that the true  
 4 reason for the termination was unlawful age discrimination. 144 Wn.2d at 189-190. In  
 5 *Reeves*, the Court allowed that "proof the defendant's explanation is unworthy of credence"  
 6 may be one form of circumstantial evidence that may be probative of intentional  
 7 discrimination, and create a question of fact for the jury to decide if "the employer is  
 8 dissembling to cover up a discriminatory purpose"; however, the Court also acknowledged  
 9 that even where the employer's statement could be rejected as untrue, it is entirely possible  
 10 for a jury to determine that the true reason was something other than unlawful  
 11 discrimination. *Reeves*, 120 S.Ct. at 2108-09.

12       Here, the jury instructions setting forth the burden of proof, elements of alleged  
 13 discrimination claims, and witness credibility, and explaining "circumstantial" and "direct"  
 14 evidence will be sufficient to allow the Plaintiff to argue his theory of the case.

15       **3. Plaintiff's requested "Unlawful Stereotyping" Instruction should not be  
 16 given.**

17       The Court should deny Plaintiff's request to instruct the jury that "a plaintiff need  
 18 not prove hostility or malice to establish intentional discrimination" and "an employment  
 19 action based on a racial and/or ageist stereotype is an act of intentional discrimination",  
 20 citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Raad v. Fairbanks North Star*  
 21 *Borough*, 323 F.3d 1185 (9<sup>th</sup> Cir. 2003), and *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d  
 22 1263 (11<sup>th</sup> Cir. 2000).

23       First, such an instruction will not be supported by the evidence at trial. Contrary to  
 24 the facts of this case, decisions cited by Plaintiff all involve *evidence* that the decision-

1 making employers engaged in some form of “stereotyping” in the context of making  
 2 employment decisions that affected the plaintiff-employees.<sup>2</sup>

3       Second, the proposed instruction is an improper comment on the evidence in the  
 4 case. Again, the ultimate question for the jury is whether the evidence establishes that the  
 5 Defendant University intentionally discriminated against Mr. Prue. Plaintiff provides no  
 6 authority supporting giving such an instruction to a jury; rather, the *Price Waterhouse*,  
 7 *Raad*, and *Joe's Stone Crab* cases all involve discussions of whether evidence is sufficient  
 8 to raise a question of fact and send the discrimination question to the jury. *See, e.g. Joe's*  
 9 *Stone Crab* (court still holds finding of disparate treatment requires finding that women  
 10 were *intentionally treated differently* by Joe's because of or on account of their gender); on  
 11 *Raad*(summary judgment case explaining the *McDonnell-Douglas* burden-shifting  
 12 mechanism; it does not even reference hostility or malice); *see also, Reeves v. Sanderson*  
 13 *Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). The legal standards the courts  
 14 “struggled with” over the years was simply whether to allow discrimination claims to  
 15 survive summary judgment absent “direct evidence” of discriminatory motive (*i.e.*,  
 16 derogatory comment or statement of racial prejudice). Recognizing that “circumstantial  
 17 evidence” could also lead a jury to conclude discrimination had occurred, the preceding  
 18 court decisions merely expanded the scope of evidence courts should consider in  
 19 determining whether a question of fact exists regarding discriminatory motive.

20

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21 <sup>2</sup> *See, e.g., Price-Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)(in order to improve her chances for  
 22 partnership, female candidate should “walk more femininely, talk more femininely, dress more femininely,  
 23 wear make-up, have her hair styled, and wear jewelry.”; other female candidates for partnership also had been  
 24 evaluated in sex-based terms); *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 f.3d 1185, 1196 (9<sup>th</sup> Cir.  
 2003)(evidence that reporting to police that Lebanese Muslim applicant's statement she was frustrated and did  
 not want to “blow up” constituted a bomb threat to “blow up the building” may have been influenced by  
 stereotypes about her nationality and/or religion); *E.E.O.C. v. Joe's Stone Crab*, 220 F.3d 1263, 1283-1284  
 (11<sup>th</sup> Cir. 2000)(restaurant's hiring decision-makers deliberately and systematically excluded female  
 applicants from consideration for lucrative positions as servers in effort to create and maintain “Old World”  
 fine-dining atmosphere, which it associated with all-male tuxedoed serving staff based on sexual stereotypes).

1           **4. Plaintiff's Title VII remedies are limited if the University Would Have**  
 2           **Made the Same Decisions Regarding Mr. Prue's Employment.**

3           In mixed-motive cases, plaintiffs may attempt to prove that impermissible  
 4 discrimination was a “motivating” factor for the employer’s challenged action. The  
 5 employer may then prove it would have made the same decision in the absence of the  
 6 impermissible factor (“same decision defense”). *See, 42 U.S.C. §2000e-5(g)(2)(B).* If the  
 7 employer does, the plaintiff may prevail, but his remedies under Title VII are limited.  
 8           *Dukes v. Walmart, 474 F.3d 1214, 1240 (9<sup>th</sup> Cir. 2007); see also, Metoyer v. CHassman,*  
 9           *504 F.3d 919 (9<sup>th</sup> Cir. 2007).*

10           Evidence at trial will establish that the same employment decisions would have been  
 11 made regardless of Mr. Prue’s race. Thus, any remedy for race discrimination under Title  
 12 VII would be limited to equitable relief.

13           **B. Plaintiff's ADEA Claim is Barred if the University Would Have Made the**  
 14           **Same Decisions Regarding Mr. Prue's Employment.**

15           Plaintiff claims the University of Washington discriminated against him because of  
 16 his age (52 years old) when Rachael Hogan did not select him for the temporary assignment  
 17 to the Administrative Coordinator position in the MEBI Department.

18           “[W]here the evidence supports a finding that discriminatory animus was one of  
 19 two or more reasons for the challenged decision, at least one of which may be legitimate,  
 20 the jury should be instructed to determine first whether the discriminatory reason was ‘a  
 21 motivating factor’ in the challenged action.” *Dominguez-Curry v. Nev. Transp. Dept., 424*  
 22 *F.3d 1027, 1041 n.7 (9th Cir.2005); see also Costa v. Desert Palace, Inc., 299 F.3d 838,*  
 23 *856–57 (9th Cir.)(en banc), aff’d 539 U.S. 90 (2003).* The first three elements set out the  
 24 elements of a “mixed motive” case under *Price Waterhouse v. Hopkins, 490 U.S. 228, 241–*  
*42 (1989)(plurality opinion).* The Ninth Circuit Pattern Instructions are sufficient to outline

1 Plaintiff's ADEA claim.

2       Under *Price Waterhouse*, even if the plaintiff proves that the employer's decision  
 3 was motivated in part by unlawful discrimination, the defendant may fully escape liability if  
 4 it can prove, by a preponderance of the evidence that "even if it had not taken [the protected  
 5 characteristic] into account, it would have come to the same decision regarding a particular  
 6 person." 490 U.S. at 242; See also, *Smith v. City of Jackson*, 544 U.S. 228 (2005)(Title VII  
 7 limits on "same decision" defense do not apply to ADEA, and it still acts as complete  
 8 defense).

9       Although the Ninth Circuit has not addressed the issue, other circuits have  
 10 unanimously continued to afford defendants the full *Price Waterhouse* "same decision"  
 11 affirmative defense in mixed-motive ADEA cases. *See, Glanzman v. Metro. Mgmt. Corp.*,  
 12 391 F.3d 506, 512 n.3 (3d Cir.2004) ("[T]he Civil Rights Act of 1991 does not apply to  
 13 ADEA cases[.]"); *Baqir v. Principi*, 434 F.3d 733, 745 (4th Cir. 2006), *cert. denied*, 127 S.  
 14 Ct. 659 (2006); *E.E.O.C. v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.2 (4th Cir.  
 15 2004); *Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir.2000)(per  
 16 curiam). Thus, if the defendant can prove by a preponderance of the evidence that it would  
 17 have made the same decision even if the plaintiff's age had played no role, the defendant is  
 18 entitled to a verdict of no liability.

19 **C. Plaintiff's Claims under Washington's Law Against Discrimination (WLAD).**

20 **1. Disparate Treatment (RCW 49.60.180).**

21 Plaintiff claims the University discriminated against him in violation of RCW  
 22 49.60.180 by refusing to select him for the temporary assignment to the Administrative  
 23 Coordinator position in the MEBI Department in September of 2005. He also claims he  
 24 was treated differently in the manner in which he was notified of temporary assignments by

1 U-Temps. WPI 330.01 should be used for these claims. Whether the jury should be  
 2 instructed on both theories will depend on whether Plaintiff actually produces evidence at  
 3 trial to support that Mr. Prue was treated “differently” in these respects.

4 **2. Retaliation (RCW 49.60.210).**

5 Plaintiff claims U-Temp Staffing Coordinators retaliated against him in violation of  
 6 RCW 49.60.210 by refusing to consider Mr. Prue for additional temporary assignments  
 7 because he complained to the Vice President of Human Resources (Joanne Suffis) about  
 8 what he perceived to be discriminatory treatment by Rachael Hogan.

9 Plaintiff proposes 9<sup>th</sup> Circuit Title VII Instructions. However, Plaintiff’s retaliation  
 10 claim is based solely on state law, for which a pattern instruction exists and should be used.  
 11 *See, WPI 330.05.* This instruction is based upon RCW 49.60.210(1), *Delahunty v. Cahoon*,  
 12 66 Wn.App. 829, 832 P.2d 1378 (1992); *Allison v. Housing Auth. of Seattle*, 118 Wn.2d 79,  
 13 821 P.2d 34 (1991); *Schonauer v. DCR Entertainment*, 79 Wn.App. 808, 905 P.2d 392  
 14 (1995); and *Milligan v. DSHS*, 110 Wn.App. 628, 42 P.3d 418 (2002).

15 According to RCW 49.60.210(1) it is unlawful for “any employer, employment  
 16 agency, labor union, or other person to discharge, expel, or otherwise discriminate against  
 17 any person because he or she has opposed any practices forbidden by *[the law against*  
 18 *discrimination]...*”

19 “A discharge will support an award of damages when (1) the employee engaged in a  
 20 statutorily protected *[opposition]* activity, (2) an adverse employment action was taken, and  
 21 (3) the statutorily protected activity was a substantial factor in the employer’s adverse  
 22 employment decision.” *Schonauer*, 79 Wn.App. at 827, 905 P.2d 392 (citing *Allison* and  
 23 *Delahunty*). In *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held  
 24 that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show

1 he/she reasonably believed there was discrimination.

2 To the extent Plaintiff is allowed to pursue a claim under RCW Ch. 49.60.210 at  
 3 trial, WPI 330.05 (*Employment Discrimination-Retaliation*) should be used. The  
 4 Instruction should be modified by adding the definition of "substantial factor" ("a  
 5 significant motivating factor in bringing about the employer's decision") found in WPI  
 6 330.01.01. *See, Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 1378  
 7 (1992)(applying standard retaliation claim). The jury should also be instructed regarding  
 8 what constitutes "protected activity" under RCW Ch. 49.60.

9 The form of any instruction, and whether it is given at all, should depend on  
 10 whether Plaintiff provides evidence that: (1) the U-Temps staffing employees who  
 11 allegedly retaliated against Mr. Prue were aware that he engaged in protected activity; and  
 12 (2) an "adverse employment decision" was made by a University employee with regard to  
 13 Mr. Prue. The court will need to determine, based on the evidence presented at trial,  
 14 whether any adverse employment decision was made. The evidence at trial will establish  
 15 the employees who allegedly retaliated against Mr. Prue had no knowledge of a complaint  
 16 of race discrimination, nor was any "adverse employment decision" made with regard to  
 17 Mr. Prue.

18 **D. Damages Issues.**

19 **1. Plaintiff's Claim For Lost Wages Should Be Limited To Wages He  
 20 Could Have Earned Had He Been Selected For The Temporary  
 21 Assignment He Alleges He Was Not Hired For, Offset by Interim  
 22 Earnings.**

23 Evidence at trial will show that the job Mr. Prue claims he was not selected for was  
 24 a temporary assignment that lasted three months. Since the interview with Ms. Hogan, Mr.  
 Prue has continued to work for the Seattle School District.

1 Plaintiff is seeking backpay under Title VII, the ADEA, and RCW 49.60. Under  
 2 both state and federal law, interim earnings should be deducted from any award of backpay.  
 3 *Wheeler v. Catholic Archdiocese*, 124 Wn.2d 634(1994).<sup>3</sup> The backpay remedy in a Title  
 4 VII case is authorized by 42 U.S.C. Sec. 2000e-5(g) (1976)(Interim earnings or amounts  
 5 earnable with reasonable diligence by the person or persons discriminated against shall  
 6 operate to reduce the back pay otherwise allowable). *Kauffman v. Sidreal Corp.*, 695 F.2d  
 7 343 (9th Cir. 1982).

8 **2. The Court Should Not Instruct the Jury Regarding Liquidated Damages  
 9 Available Under the ADEA.**

10 A Plaintiff can recover liquidated damages under the ADEA, but only if the  
 11 defendant's violation is willful. 29 U.S.C. §626(b)(ADEA remedies provision).  
 12 Willfulness is generally a question for the jury to decide. *See, E.E.O.C. v. Pape Lift, Inc.*,  
 13 115 F.3d 676, 681 (9th Cir. 1997). An employer acts willfully when it “‘knew or showed  
 14 reckless disregard’ for whether the ADEA prohibited its conduct.” *Cassino v. Reichhold  
 15 Chems., Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987)

16 However, there will be no evidence of “willful” age discrimination presented at  
 17 trial; therefore no instruction should be given regarding liquidated damages under the  
 18 ADEA.

19 **3. Limits on Non-Economic Damages and Backpay Under the ADEA.**

20 The ADEA does not provide for non-wage compensatory or punitive damages.  
 21 *Naton v. Bank of California*, 649 F.2d 691, 698–99 (9th Cir.1981). Thus, a plaintiff cannot  
 22 recover for emotional distress or pain and suffering under the ADEA. *Id.*; *see also Comm'r  
 23 v. Schleier*, 515 U.S. 323, 326 (1995).

24 <sup>3</sup> In Title VII case, the court, not the jury, determines the amount of back pay. *Lutz v. Glendale Union High  
 25 School*, 403 F.3d 1061, 1069 (9th Cir.2005).

1       Unlike cases under Title VII, the jury determines back pay awards under the ADEA,  
 2 as well as any mitigation issues. *See, Lorillard v. Pons*, 434 U.S. 575, 582-83  
 3 (1978)(characterizing this remedy as “legal”); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d  
 4 1338, 1346 (9th Cir.1987)(discussing jury trial on mitigation). Thus, the court should  
 5 instruct the jury regarding mitigation of backpay damages.

6       **4.       Mitigation of General Damages.**

7       Evidence at trial will reflect that Mr. Prue failed to seek medical or mental health  
 8 treatment for more than three years after his interaction with the University, despite his  
 9 claims that he consistently suffered extreme emotional distress, visited his doctor several  
 10 times for other conditions, and was specifically screened for depression and PTSD during  
 11 this time period. When he finally sought treatment after filing this lawsuit, he was  
 12 prescribed medication that medically reduced his symptoms within a few weeks. Thus, the  
 13 court should instruct the jury with WPI 33.02:

14       **Avoidable Consequences—Failure to Secure Treatment**

15       A person who is liable for an injury to another is not liable for  
 16 any damages arising after the original injury that are  
 17 proximately caused by failure of the injured person to  
 exercise ordinary care to avoid or minimize such new or  
 increased damages.

18       In determining whether, in the exercise of ordinary care, a  
 19 person should have secured or submitted to medical  
 20 treatment, as contended by Defendant you may consider the  
 nature of the treatment, the probability of success of such  
 treatment, the risk involved in such treatment and all of the  
 surrounding circumstances.

21       The defendant has the burden to prove plaintiff's failure to  
 22 exercise ordinary care and the amount of damages, if any, that  
 23 would have been minimized or avoided.

24       Whether or not reasonable care requires an injured person to submit to treatment is

1 a jury question. *Martin v. Foss Launch & Tug Co.*, 59 Wn.2d 302, 367 P.2d 981 (1962).  
 2 The principles relating to the duty of an injured person in the securing of treatment are  
 3 considered in *Dahl v. Wagner*, 87 Wash. 492, 151 P. 1079 (1915); *Hoseth v. Preston Mill*  
 4 Co., 49 Wash. 682, 96 P. 423 (1908); and *Rowe v. Whatcom County Ry. & Light Co.*, 44  
 5 Wash. 658, 87 P. 921 (1906). *Also see*, 62 A.L.R.3d 9, *Duty of Injured Person to Submit to*  
 6 *Surgery to Minimize Tort Damages*. Plaintiff is seeking damages under state and federal  
 7 law to compensate for emotional distress and “pain and suffering” allegedly resulting from  
 8 medically diagnosable and medically treatable conditions (depression and anxiety). There  
 9 is no reason general principles applicable to recovery of such damages would not apply  
 10 here.

11 **E. The Jury Should Be Given Definitional Instructions Regarding Evidence of the**  
**EEOC Reasonable Cause Determination.**

12 Prior to trial, the court ruled that evidence of the EEOC’s “reasonable cause”  
 13 determination may be admissible at trial pursuant to *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502, 505 (9<sup>th</sup> Cir. 1981). *See, Dkt. No. 77(Ordering Denying Plaintiff's Motion in Limine and Granting in Part Defendant's Motion in Limine)*. If the Determination is  
 14 admitted into evidence, the jury should be instructed regarding the meaning of Reasonable  
 15 Cause.

16 “Reasonable cause is more than suspicion but less than a preponderance of  
 17 evidence.” *In re: Napster, Inc. Copyright Litigation*, 479 F.3d 1078 (9<sup>th</sup> Cir. 2007)(quoting  
 18 *United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir.1996)(explicating also *In re: Grand*  
 19 *Jury Proceedings*, 87 F.3d 377, 380 (9th Cir.1996)(stating the standard as less than “beyond  
 20 a reasonable doubt” but more than “a sneaking suspicion.”).

21 Other Federal courts have approved jury instructions relating to reasonable cause

1 determinations. Specifically, the Eleventh Circuit, approved the following instruction:

2       *The Plaintiff sued the Defendant for violation of his rights  
3 under Title VII of the Civil Rights Act of 1964. Pursuant to  
4 that Act, an individual who believes his rights have been  
5 infringed upon must first file a "Charge of Discrimination"  
6 with the Equal Employment Opportunity Commission, or the  
7 EEOC as it is called, before he or she may bring a lawsuit.*

8       *Upon receiving that charge, the EEOC must investigate the  
9 allegation. After investigation, the EEOC may either  
10 determine there is not reasonable cause to believe the charge  
11 is true and dismiss the charge or determine that there is  
12 reasonable cause to believe that a charge is true. Whether or  
13 not the EEOC determines cause, the person who alleges to be  
14 aggrieved may file a lawsuit. The EEOC's reasonable cause  
15 determination is not an adjudication of rights and liabilities.  
16 Indeed, it is a nonadversary proceeding designed to notify the  
17 employer of the EEOC's findings, which is not reviewable in  
18 court and not binding on the employer.*

19       *Goldsmith v. Bagby Elevator*, 513 F.3d 1261, 1288-89 (11<sup>th</sup> Cir. 2008). Thus, Defendant  
20 proposes the following instruction to provide context and definitions regarding the EEOC  
21 Determination:

- 22       • **Proposed Oral Instruction to be given at the time EEOC  
23 Determination is Admitted into evidence:** George Prue has sued the  
24 University of Washington for violation of rights under Title VII of the  
Civil Rights Act of 1964. Pursuant to that Act, an individual who  
believes his rights have been infringed upon must first file a "Charge  
of Discrimination" with the Equal Employment Opportunity  
Commission, or the EEOC as it is called, before he or she may bring a  
lawsuit. Upon receiving that charge, the EEOC must investigate the  
allegation. The standard of proof used in this investigation is  
"reasonable cause."

25       *Goldsmith v. Bagby Elevator*, 513 F.3d 1261, 1288-89 (11<sup>th</sup> Cir. 2008).

- 26       • **"Reasonable cause" is more than suspicion, but less than a  
27 preponderance of the evidence."**

28       *In re Napster, Inc., Copyright Litigation*, 479 F.3d 1078, 1094 (9<sup>th</sup> Cir. 2007).

- 29       • **The EEOC's reasonable cause determination is not an  
30 adjudication of rights and liabilities. It is a nonadversary**

1 proceeding designed to notify the employer of the EEOC's  
2 findings, which is not reviewable in court and not binding on the  
employer.

3 *Goldsmith v. Bagby Elevator*, 513 F.3d 1261, 1288-89 (11<sup>th</sup> Cir. 2008).

4 Simply admitting the EEOC Determination without explanation or definition of  
5 legal terms is likely to create confusion and is unduly prejudicial to the Defendant  
6 University. *See also*, Dkt. Nos. 54, 72, and 75 (additional bases for excluding evidence of  
7 the EEOC Determination altogether).

8 **F. Witness Issues.**

9 The jury will hear testimony regarding actions of two witnesses who will be  
10 unavailable to testify at trial. Both are former employees of the University of Washington  
11 and worked in the U-Temps Department.

12 **Laura Andrews:** Ms. Andrews was the Manager of U-Temps in 2005. She  
13 subsequently passed away. She was unavailable for deposition or trial testimony.

14 **Terry Bustamante:** Mr. Bustamante separated from the University some time ago  
15 for medical reasons. Due to ongoing serious health conditions, Mr. Bustamante was  
16 unavailable for deposition or trial testimony.

17 The parties have stipulated that it would be appropriate to give an oral instruction  
18 regarding the unavailability of these witnesses at trial:

19 You will hear testimony regarding former University  
20 employees Laura Andrews and Terry Bustamante. You  
will not hear testimony from Ms. Andrews because she is  
21 deceased. You will not hear testimony from Mr.  
Bustamante because he is medically unable to appear at  
trial due to a medical condition.

22 //

23 //

1 DATED this 27<sup>th</sup> day of May, 2009.

2 KEATING BUCKLIN & MCCORMACK, INC., P.S.

3 s/Jayne L. Freeman

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## **CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2009, I electronically filed Defendant's Trial Brief with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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**DEFENDANT'S TRIAL BRIEF-17  
Cause No. C07-1859 RSL**

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